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Supreme Court, U.S.
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In The
Supreme Court of The United States
October Term 1997

ELECTRONIC ENGINEERING COMPANY
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Respondent.

Petition For A Writ Of Certiorari
To The United States Court of Appeals
For The District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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I. QUESTIONS PRESENTED FOR REVIEW

In a case of first impression, whether the Federal Communications Commission (FCC) can ignore *Ashbacker*, its own procedural rules, and judicial precedent without violating Fifth Amendment Due Process requirements by assigning application processing and decision making functions to a private sector trade association, or whether Petitioner is entitled to procedural protections throughout the FCC's application filing process, notwithstanding the determination that the private sector trade association's services involve "pre-filing procedures," because the private sector trade association is a state actor which is required to honor Petitioner's federal procedural rights throughout the application filing process?

Whether the FCC may, without violating Fifth Amendment Due Process requirements, fail to provide Petitioner with prior notice of the circumstances under which applications would be subject to dismissal where the court of appeals with exclusive jurisdiction over FCC radio licensing cases has previously determined that "full and explicit notice" of the circumstances under which the FCC may dismiss applications is a matter of "fundamental fairness?"

II. LIST OF PARTIES TO THE PROCEEDING

1. Petitioner (previous Appellant), Electronic Engineering Company (Des Moines, IA). There is no parent company. ATS Mobile Telephone, Inc. (Omaha, NE) is a non-wholly owned subsidiary or affiliated company.

2. Respondent (previous Appellee), Federal Communications Commission.

3. Intervenors below: PageMart II, Inc. and Personal Communications Industry Association.

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1. *Electronic Engineering Company v. Federal Communications Commission*, 140 F.3d 1045 (D.C. Cir. 1998).

2. *Electrical [sic] Engineering Company and PageMart II, Inc.*, 12 FCC Rcd. 3819 (Comm'n 1997).

VI. STATEMENT OF JURISDICTION

The United States Court of Appeals for the District of Columbia Circuit filed its opinion in the case below on April 14, 1998. Pursuant to Circuit Rule 35, Petitioner timely filed a combined petition for rehearing and rehearing *in banc* on May 28, 1998. Petitioner's requests for rehearing and rehearing *in banc* were denied by the United States court of appeals below by separate orders filed on June 11, 1998 and the instant petition is being filed within 90 days of those denials. The Supreme Court has jurisdiction to review this matter pursuant to 47 U.S.C. § 402(j) and 28 U.S.C. § 1254(1).

VII. CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS

(Full Text Provided in Appendix C)

Constitutional Provisions

U.S. Const. Amend. V

Statutory and Regulatory Provisions

47 C.F.R. § 0.401(b)
47 C.F.R. § 1.7
47 C.F.R. § 1.912(b)
47 C.F.R. § 90.127(a)
47 C.F.R. § 90.131(a)
47 C.F.R. § 90.164(a)
47 C.F.R. § 90.165(d)(1)
47 C.F.R. § 90.175(c) [now § 90.175(j)]

VIII. STATEMENT OF THE CASE

A. Introduction--Factual and Regulatory Background

The facts of this Federal Communications Commission (FCC) licensing case of first impression are not in dispute. Several years ago the FCC adopted a *Report and Order* (*Exclusivity Order*), 8 FCC Rcd 8318 (Comm'n 1993) which amended the rules to provide for channel exclusivity in the 929-930 MHz paging service frequency band, including the 929.7625 MHz channel at issue instantly. For years previously these paging channels had been licensed on a non-exclusive, shared basis.[1] While the channels were shared the FCC relied upon "frequency coordination and licensee cooperation to prevent interference and promote efficient channel use." *Exclusivity Order*, 8 FCC Rcd. at 8318 ¶ 2. The FCC designated the Personal Communications Industry Association (PCIA)[2] as the Frequency Coordinator for the

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[1] The thirty-five exclusively licensed 929 MHz channels are found at 47 C.F.R. § 90.493(a); five channels remain assignable on a shared basis.

[2] The *Exclusivity Order* refers to "NABER," National Association of Business and Educational Radio, Inc., as the Frequency Coordinator. PCIA acquired NABER several years ago and PCIA assumed NABER's frequency coordination functions. Because PCIA acquired NABER, and because the orders being appealed refer to PCIA rather than NABER, the instant pleading shall refer to PCIA as meaning NABER also. PCIA is a private sector trade association (continued...)

exclusive paging channel at issue instantly.[3] *Exclusivity Order*, 8 FCC Rcd. at 8332 ¶ 40. The *Exclusivity Order* provides that applications for 929.7625 MHz will be processed on a "first-come, first-served basis, regardless of whether the applicant is adding transmitter sites to an existing system or establishing a new system." *Exclusivity Order*, 8 FCC Rcd. at 8330 ¶ 32.

On February 21, 1994 PageMart II, Inc. (PageMart) submitted applications to PCIA seeking to establish a paging system on 929.4875 MHz. On March 14, 1994 and continuing thereafter Electronic Engineering Company (EEC) (instant Petitioner) submitted applications to PCIA to expand its existing paging system operating on the 929.7625 MHz frequency at issue instantly. On March 15, 1994 PageMart submitted a request for nationwide exclusivity on 929.4875

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[2](...continued)
representing various wireless communications carriers before the FCC, Congress, and the courts. PCIA is supported by its members who pay annual membership fees and by FCC applicants who pay frequency coordination fees; PCIA's coordination responsibilities include services in addition to the 929-930 MHz service.

[3] PCIA has been the FCC's designated 929-930 MHz Frequency Coordinator since at least 1982 when all such channels were assigned on a shared basis. *Second Report and Order*, 91 F.C.C.2d 1214, 1228 ¶ 49 (Comm'n 1982).

MHz. *Memorandum Opinion and Order* (*Denial Order*), 12 FCC Rcd. 3819 ¶ 2 (Comm'n 1997); Apdx. B-29.[4]

In May 1994 PCIA determined that it would not coordinate PageMart's request for nationwide exclusivity on 929.4875 MHz. PCIA considered that 929.7625 MHz was "the most appropriate" frequency and PageMart authorized PCIA to amend its 929.4875 MHz applications and its exclusivity request to specify 929.7625 MHz, the channel for which EEC had already filed. PageMart's applications were then submitted to the FCC by PCIA during the first week of May 1994. *Denial Order*, 12 FCC Rcd. at 3820 ¶ 3; Apdx. B-30. PCIA then determined that it would not coordinate EEC's applications for 929.7625 MHz because it had already coordinated PageMart's request for nationwide exclusivity on that frequency. *Denial Order*, 12 FCC Rcd. at 3820 ¶ 4; Apdx. B-30. On October 14, 1994 EEC filed with the FCC

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[4] The *Denial Order* is the FCC order being appealed instantly. ¶ 9 of the *Denial Order* states that PageMart filed its 929.4875 MHz applications between October 1993 and February 1994. Apdx. B-34. This contradicts the statement in ¶ 2 of the *Denial Order* which found that PageMart submitted applications for 309 sites on February 21, 1994 with additional applications being submitted "over the next few months . . . requesting a total of 429 sites on 929.4875 MHz." Apdx. B-29. The discrepancy is not of decisional significance, but is noted to avoid confusion. It is also noted that the last sentence in ¶ 9 incorrectly states that EEC's frequency is "929.4875 MHz," the correct frequency is "929.7625 MHz."

a Petition to Dismiss 929 MHz Exclusivity Request (Petition to Dismiss) seeking to have PageMart's applications and exclusivity request dismissed as improperly amended and on October 17, 1994 EEC submitted a Regional Exclusivity Request to PCIA seeking exclusivity on 929.7625 MHz.[5] *Denial Order*, 12 FCC Rcd. at 3819, 3822 ¶ ¶ 1, 9; Apdx. 28-29, 35.

B. The Decisions Below

EEC's Petition to Dismiss was denied by the FCC's Private Radio Bureau's Land Mobile Branch's June 1, 1995 letter order. On July 3, 1995 EEC filed an Application for Review with the FCC which culminated in the *Denial Order* reviewed by the United States Court of Appeals for the District of Columbia Circuit below. *Denial Order*, 12 FCC

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[5] The FCC has deleted 47 C.F.R. § 90.495 which described the requirements for gaining local, regional, and nationwide exclusivity. *Second Report and Order and Further Notice of Proposed Rule Making*, 12 FCC Rcd. 2732 (Comm'n 1997), *review pending*, *Benkelman Telephone Company, et al. v. FCC*, Case No. 97-1245, D.C. Cir. (it is believed that the deletion of § 90.495 is not of decisional significance to the instant case). § 90.495 generally provided that a local exclusive system consists of 6 transmitters located within 25 miles of another transmitter in the same system; a regional exclusive system consists of at least 70 transmitters in no more than twelve states; a nationwide exclusive system consists of at least 300 transmitters providing service to at least 50 markets, including 25 of the top 50 markets and two markets in seven listed regional areas.

Rcd. 3819 ¶ 1; Apdx. B-28. The *Denial Order* finds that the *FCC*'s rules do "not provide any specific procedures for changes in applications made by a frequency coordinator." 12 FCC Rcd. at 3820 ¶ 8; Apdx. B-33. The *Denial Order* further finds that

> PCIA processed the applications in order of receipt, consistent with the long established standard for coordinators. PCIA had the discretion to change the frequency requested by PageMart to the most appropriate one, prior to the time the applications were filed with the Commission. Because the change in frequency was made by PCIA prior to the time the applications were filed with the Commission, the change in frequency did not constitute a substantial application amendment which would require an approving signature of a PageMart principal.

12 FCC Rcd. 3822 ¶ 9; Apdx. B-34.

The Court of Appeals accepted the FCC's explanation of the Frequency Coordinator's previously unarticulated authority to alter the frequency requested on applications which it was processing and stated that

> as the Commission explained, the rules relied upon by EEC govern amendments to applications that have been filed with the Commission, 12 F.C.C.R. at 3821. Frequency coordination, however, is clearly a pre-filing procedure. Frequency coordinators are to file the applications directly with the Commission after they have performed "appropriate frequency coordination." 47 C.F.R. §§ 1.912(b), 90.127(a); 103 F.C.C.2d at 1104-05. Contrary to EEC's assumption, applications are not considered to be filed with the

> Commission when they are received by the coordinator, but only when they are received by the Commission at its designated location. 47 C.F.R. § 1.7 (1997). At the time that it altered PageMart's applications, PCIA obviously had not filed the applications with the Commission, and thus PCIA was not bound by rules that govern post-filing amendments.

Electronic Engineering Company v. FCC, 140 F.3d 1045, 1051 (D.C. Cir. 1998); Apdx. B-21.

The FCC had jurisdiction over the subject matter of the instant appeal pursuant to 47 U.S.C. § 151, et seq. The *Denial Order*, the final agency order at issue instantly, was released to the public on March 27, 1997. 47 U.S.C. §402(c) requires that a party appealing an FCC order file a notice of appeal with the court of appeals within 30 days of the final agency action. EEC complied with this requirement by filing its Notice of Appeal with the court of appeals on April 11, 1997. The court of appeals obtained jurisdiction over EEC's appeal pursuant to 47 U.S.C. § 402(b).

C. Summary of Argument

In concluding that the Frequency Coordinator's actions take place in a "pre-filing" setting, the court of appeals failed to discuss the fact that the Frequency Coordinator is an agent of the federal government which is bound to honor EEC's procedural rights because of its position as a state actor. Moreover, the court of appeals failed to explain how EEC's procedural rights claims can be dismissed as concerning merely "pre-filing procedures" where

the filing of applications with the Frequency Coordinator is *mandatory* under the very rules upon which the court of appeals relies in the passage quoted immediately above in Section VIII B.[6]

The Communications Act grants the FCC exclusive jurisdiction over radio licensing and thus radio licensing is properly considered a power traditionally exercised by the federal government. *Radio Station WOW v. Johnson*, 326 U.S. 120, 130-31 (1945). Instantly, the Frequency Coordinator determined that PageMart's initial request for 929.4875 MHz would not serve the public interest, the Frequency Coordinator amended PageMart's applications to specify 929.7625 MHz thereby depriving the FCC of the opportunity to determine whether PageMart's request for 929.4875 MHz served the public interest, and the Frequency Coordinator dismissed EEC's concurrently pending applications for 929.7625 MHz pursuant to 47 C.F.R. §§ 90.175(c), § 90.127(a), and § 1.912(b). While the lower court below has previously determined that a frequency coordinator is not a federal agent for the passive purpose of collecting FCC filing fee checks, *Brown and Schwaniger v. FCC*, 888

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[6] The appeals court's factual recitation correctly notes that while applicants were able to seek permissive coordination through a frequency coordinator as of 1958, in 1986 the FCC determined that "an applicant *must* send its completed application to the certified frequency coordinator . . . rather than to the Commission." 140 F.3d at 1047; Apdx. A-9 (emphasis added).

F.2d 898 (D.C. Cir. 1989), the instant case presents a case of first impression as to whether the Frequency Coordinator's substantive duties of frequency coordination make it a state actor. It is plain that the Frequency Coordinator serves as an agent of the federal government and that the Frequency Coordinator is not free to ignore the FCC's amendment rules which are designed to protect EEC's procedural rights.

This Court long ago determined that applicants before the FCC are entitled to statutory procedural protections. *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945). Even though *Ashbacker* was raised in the briefs and explored by the appeals court at oral argument, Trans. at 24-30, the appeals court's opinion fails to discuss, or even to reference, *Ashbacker*. The court of appeals correctly notes that the FCC's rules "provide[] no specific instructions for handling changes to applications while pending coordination," 140 F.3d at 1050, Apdx. A-17. However, the court of appeals' opinion fails to discuss its own long standing precedent which holds that

> *fundamental fairness . . . requires* that an exacting application standard, enforced by the severe sanction of dismissal without consideration of the merits, be accompanied by *full and explicit notice* of all prerequisites for such consideration.

Salzer v. FCC, 778 F.2d 871-72 (D.C. Cir. 1985) (emphasis added). Even though prior notice of the circumstances which will lead to dismissal of an FCC radio frequency application is a matter of "fundamental fairness," the court of appeals

below affirmed the FCC's decision to dismiss EEC's applications under rules which did not specify "instructions for handling changes to applications while pending coordination." 140 F.3d at 1050, Apdx. A-17. Because EEC was not afforded prior notice of the circumstances under which its applications would be dismissed without consideration of their merit, EEC was deprived of fundamental procedural right in violation of the Due Process Clause of the Fifth Amendment. U.S. Const. Amend. V.

The appeals court's determination that EEC lacked procedural rights while its and PageMart's applications were pending before the Frequency Coordinator is insupportable because the appeals court failed to consider that the Frequency Coordinator is an agent of the federal government and a state actor which must honor EEC's procedural rights. Moreover, the court of appeals failed to consider that EEC had a fundamental right to explicit prior notice of the circumstances under which its applications would be subject to dismissal. Reversal and remand are required to determine whether the Frequency Coordinator's and the FCC's actions violated EEC's federally protected procedural rights and to determine whether EEC was provided with the constitutionally required prior notice.

IX. ARGUMENT

A. EEC's Procedural Rights Are Not Diminished By Assignment of Application Processing and Decision Making Functions to a Private Party

Ashbacker Radio Corp v. FCC, 326 U.S. 327 (1945) requires that the FCC give consideration to all properly filed applications. While addressed in the briefs, Appellant's Brief at 10, Appellant's Reply Brief at 1, 3, 10, and at oral argument, Trans., at 24-30, the court of appeals does not address *Ashbacker*. However, the court of appeals implicitly determined that *Ashbacker* rights do not apply to applications which are before the Frequency Coordinator because "frequency coordination, however, is clearly a pre-filing procedure." 140 F.3d at 1051; Apdx. A-20. Other than the *Denial Order* under review instantly, the court of appeals does not rely upon any precedent or FCC rule which defines frequency coordination as a "pre-filing procedure." The FCC's rules and pertinent case law provide procedures to be used in signing application amendments and in making substantial amendments to applications which amendments cause the applications to be considered to be newly filed. *See e.g., R.L. Broadcasters*, 8 FCC Rcd. 7031, 7031 (Comm'n 1993); 47 C.F.R. §§90.131(a), 90.164(a), 90.165(d)(1). However, the court of appeals found these authorities irrelevant because

> At the time it altered PageMart's applications, PCIA obviously had not filed the applications with the

> Commission, and thus PCIA was not bound by the rules that govern post-filing amendments. The cases cited by EEC are off the mark. Two of the cases, like the rules cited by EEC, concerned amendments to applications already filed with the Commission.

140 F.3d at 1051, 1052; Apdx. A-20-21, 23.

1. Frequency Coordination Is Not A "Pre-filing Procedure."

The court of appeals relies upon three rule sections and a portion of a 1986 FCC order to conclude that the frequency coordination process involves a "pre-filing procedure" during which procedural protections are inapplicable. 140 F.3d at 1051; Apdx. A-20. None of these supporting materials uses the phrase "pre-filing procedure" and the explicit language contained therein provide that frequency coordination is an integral part of the application filing process.

47 C.F.R. §90.127(a) provides, in pertinent part, that

> All applications for private land mobile licenses that require both frequency coordination and fees as set forth at Part 1, Subpart G of this chapter *shall first be sent to a certified coordinator* for the radio pool concerned as specified in §§90.20(c)(2) and 90.35(b)(2). After the appropriate coordination and attachment of the statutory fee, such applications shall

be forwarded to the appropriate address in accordance with §0.401(b) of the Rules.

(Emphasis added.) §90.127(a) provides procedures which an applicant *must* follow if it wishes to have an application considered by the FCC; there is no alternative method of filing. *Report and Order* (*1986 Report & Order*), 103 F.C.C.2d 1093, 1104-05 (Comm'n 1986). If an applicant were to send its application directly to the FCC without first filing with the coordinator, the application would be dismissed as procedurally defective. §90.127(a) provides the filing sequence which an applicant must follow in order to have its application processed and the fact that the applicant must first "send" its application to a frequency coordinator who later "forwards" the application to the FCC's lockbox bank does not support the conclusion that frequency coordination is a "pre-filing procedure," the rule merely provides that frequency coordination is the first step in the filing process.[7]

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[7] 47 C.F.R. § 0.401(b) provides that applications shall first be sent to the FCC's lockbox bank in Pittsburgh, PA "unless otherwise directed by the Commission." Instantly, the Commission has directed "otherwise," that is, applications are first to be sent to the Frequency Coordinator and then to the lockbox bank. § 0.401(b) provides further that the filing instructions found at § 90.127(a) and § 1.912(b), which requires applications to be first sent to a frequency coordinator, are controlling. The court of appeals does not

(continued...)

47 C.F.R. §1.912(b) is worded similarly to § 90.127(a) and also does not support a finding that frequency coordination is a "pre-filing procedure." § 1.912(b) provides that

> All applications for private land mobile licenses which require both frequency coordination and fees as set forth at Part 1, Subpart G of this chapter *shall first be sent to the certified coordinator* for the radio service or frequency group concerned. After the appropriate frequency coordination and attachment of the statutory fee, such applications shall be forwarded to the appropriate address in accordance with §0.401(b) of the Rules.

(Emphasis added). Like §90.127(a), this rule section does not classify frequency coordination as a "pre-filing procedure." Also like §90.127(a), §1.912(b) explicitly provides that applications will be procedurally defective if they are not "first sent to the certified coordinator." The language of §1.912(b) merely provides that frequency coordination is the first step in the application filing process.

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[7](...continued)
explain why application receipt by the FCC's designated lockbox bank is substantively different from application receipt by the Frequency Coordinator; it does not appear that there is any meaningful distinction. Indeed, the lockbox bank's limited function of associating filing fee checks with applications seems to be of lesser substantive import compared to Frequency Coordinator's purported ability to make substantive alterations to applications.

Finally, 47 C.F.R. §1.7 does not support a finding that frequency coordination is a "pre-filing procedure." § 1.7 provides that

> Unless otherwise provided in this Title, by Public Notice, or by decision of the Commission, or of the Commission's staff acting on delegated authority, pleadings and other documents are considered to be filed with the Commission upon their receipt at the location designated by the Commission.

Under § 1.7 applications will be "considered filed with the Commission upon their receipt at the location designated by the Commission." §§ 90.127(a) and 1.912(b) provide that the Frequency Coordinator is the "first" place designated by the FCC for the receipt of applications. The three regulations relied upon by the court of appeals do not at all state that frequency coordination is a "pre-filing procedure;" those rules provide that frequency coordination is an indispensable component of the application filing process.[8]

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[8] The court of appeals does not address the fact that the *Denial Order* refers to applications as being "filed" with the Frequency Coordinator. 12 FCC Rcd. at 3822 ¶ 3; Apdx. 30. Moreover, *Denial Order* refers to PCIA's actions as "amend[ing]" PageMart's applications. 12 FCC Rcd. at 3820 ¶3; Apdx. B-30. The FCC's use of the formal words "filed" and "amend" in conjunction with the Frequency Coordinator's actions plainly indicate that something more than an informal "pre-filing procedure" is involved as the court of appeals was apparently led to believe.

The court of appeals criticized EEC for citing "to a number of scattered provisions, many of which do not involve private radio services," in support of EEC's argument that the Frequency Coordinator lacked authority to alter PageMart's applications. 140 F.3d 1052; Apdx. A-23. A better description of EEC's numerous citations is that EEC demonstrated a consistent, pervasive practice on the part of the FCC regarding the procedural issues in question.[9] The rules EEC cited regulate how applications are handled during the filing process and nothing in §§90.127(a), 1.912(b), and 1.7 alters the standard manner in which applications are amended merely because the applications are pending coordination.

2. Even If Frequency Coordination Were Properly Characterized As A Pre-filing Procedure, The Frequency Coordinator Is A State Actor Which Must Honor EEC's Procedural Rights.

Even if frequency coordination were properly termed a "pre-filing procedure," such nomenclature does not

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[9] It is standard practice to construe FCC regulations by comparing them with its other regulations. *See e.g., Further Notice of Proposed Rulemaking,* 9 FCC Rcd. 2863, 2884 n. 174 (Comm'n 1994) (proposed SMR ownership attribution rule compared to a PCS rule, to a broadcast rule, and to a cable TV rule); *see also, Tataranowicz v. Sullivan*, 959 F.2d 268, 276 (D.C. Cir. 1992) (even where statutory language appears clear, resort to other evidence such as the design of the statute as a whole and to its object and policy" is appropriate).

eliminate EEC's procedural protections.[10] While the decisions below do not address the Frequency Coordinator's status as a federal agent in this case of first impression,[11] it is clear that procedural rights apply when the FCC holds applications.[12] The fact that the FCC's rules require applicants to send applications to a federally certified frequency coordinator as the "first" step in a mandatory application filing process does

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[10] The lower court holds that *Ashbacker* requires "the FCC to treat mutually exclusive applications equally," *Committee for Effective Cellular Rules v. FCC*, 53 F.3d 1309, 1320 (D.C. Cir. 1995); "the [FCC] must use the same set of procedures to process the applications of all similarly situated persons who come before it seeking the same license." *Maxcell Telecom Plus, Inc. v. FCC*, 815 F.2d 1551, 1555 (D.C. Cir. 1987).

[11] Since learning of PCIA's application alterations EEC has argued that the Frequency Coordinator is a governmental agent bound by the FCC's filing rules. *See* EEC's November 7, 1994 Reply to Opposition to Petition to Dismiss 929 MHz Exclusivity Request, at 2; EEC's July 3, 1995 Application for Review, at 6; EEC's August 2, 1995 Reply to Application for Review, at 2; EEC's January 2, 1998 appeals court Brief at xxix, 20-23; February 2, 1998 Trans. at 4-5; EEC's May 28, 1998 Petition for Rehearing and Suggestion for Rehearing *in Banc*, at 9-15.

[12] The decisions below hinge on the finding that the frequency coordination process is a "pre-filing procedure" where procedural protections do not apply.

not support a finding that procedural rights are not implicated at that point and the court of appeals' determination that

> at the time it altered PageMart's applications, PCIA obviously had not filed the applications with the Commission, and thus PCIA was not bound by rules that govern post-filing amendments

140 F.3d at 1051, Apdx. A-20-21, is manifestly incorrect.

Every process has a first step and there is nothing in this case which suggests that the various procedural protections do not apply at the first step of the 929 MHz filing process, i.e., the frequency coordination stage. Instantly, the Frequency Coordinator determined that PageMart's initial request of 929.4875 MHz would not serve the public interest, the Frequency Coordinator amended PageMart's applications, and the Frequency Coordinator dismissed EEC's applications without forwarding them to the FCC. 140 F.3d at 1048; Apdx. A-12 . The fact that one might characterize frequency coordination as the "first step," or even as a "pre-filing procedure," does not diminish the critical importance of that mandatory first step.

The question plainly presented "is whether the government has so injected itself into the private actor's decision triggering federal regulation that the decision may, for purposes of constitutional analysis, be treated as the government's." *Alliance for Communications Democracy v. FCC*, 56 F.3d 105, 121 n. 16 (D.C. Cir. 1995) (*in banc*), aff'd in part, rev'd in part, 518 U.S. 727 (1996). The two part test

to determine whether the deprivation of a right by a private actor is attributable to the government is

> first, the deprivation must be caused by the exercise of some right or privilege created by the state, or by a rule of conduct imposed by the state or by a person for whom the state is responsible. . .. Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor because he is a state official, or because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the state.

Lugar v. Edmonston Oil, Co., Inc., 457 U.S. 922, 938-39 (1982).

State action may be found in a private entity's actions where

> the State creates the legal framework governing the conduct, e. g., *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975); if it delegates its authority to the private actor, e.g., *West v. Atkins*, 487 U.S. 42 (1988); or sometimes if it knowingly accepts the benefits derived from unconstitutional behavior, e. g., *Burton v. Wilmington Parking Authority, supra* [365 U.S. 715 (1961)]. Thus, in the usual case we ask whether the State provided a mantle of authority that enhanced the power of the harm-causing individual actor.

NCAA v. Tarkanian, 488 U.S. 179, 192 (1988).

As discussed above, the Frequency Coordinator determined that PageMart's initial request for 929.4875 MHz did not serve the public interest, the Frequency Coordinator

amended PageMart's applications, and the Frequency Coordinator dismissed EEC's applications for 929.7625 MHz pursuant to § 90.175(c), § 90.127(a), and § 1.912(b). The FCC permitted the coordinator to decide that PageMart's requests for 929.4875 MHz were not in the public interest,[13] that PageMart's requests for 929.4875 MHz should not be reviewed by the FCC, and that EEC's applications for 929.7625 MHz should be dismissed and not reviewed by the FCC. But for the instant litigation, the Frequency Coordinator's decisions in these areas would not have been reviewed by the FCC. Thus, not only has the FCC established "the legal framework governing the conduct" of the Frequency Coordinator, the FCC has delegated the

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[13] At oral argument EEC argued that PCIA's amendments to PageMart's applications precluded the FCC from making a public interest finding regarding PageMart's initially requested frequency of 929.4875 MHz. Trans. at 5-6; *1986 Report and Order*, 103 F.C.C.2d 1093, 1103 ¶ 20 (1986) ("coordinators will not be required to make a final determination on eligibility, permissible usage, or whether the use of a particular communication facility is in the public interest."). While the FCC's policy regarding PCIA's ability to determine the public interest may have changed, this change directly implicates the Frequency Coordinator's exercise governmental powers. The Communications Act grants the FCC exclusive jurisdiction over radio licensing and thus radio licensing is properly considered a power traditionally exercised by the federal government. *Radio Station WOW v. Johnson*, 326 U.S. 120, 130-31 (1945).

government's decision making authority to the Frequency Coordinator and the FCC defers to the Frequency Coordinator's judgments. This delegation of decision making authority to a private actor requires a finding that the Frequency Coordinator is acting on behalf of the federal government and that the Frequency coordinator is bound to honor EEC's procedural rights. *West v. Atkins*, 487 U.S. 42, 54-55 (1988) (prison doctor found to be a state actor because prisoners could look to no other for medical attention and the state defers to the doctor's medical determinations).

Moreover, the Frequency Coordinator collects fees from applicants for performing frequency coordination services for the government. § 90.127(a). §90.175(c) makes frequency coordination mandatory and payment of PCIA's coordination fees by the public, including EEC in this case, is unavoidable. Because the coordination rule provides a governmental benefit to the Frequency Coordinator, a second basis exists upon which to find that the Frequency Coordinator's actions are attributable to the federal government. Unlike cases in which payments are made to the private actor where the actor does not act at the direction of the state, *see e.g.*, *Blum v. Yaretsky*, 457 U.S. 991 (1982) (reduction in Medicaid payments to discharged patients did not influence nursing home transfer/discharge decisions and therefore nursing home was not a state actor); *Polk County v. Dodson*, 454 U.S. 312 (1982) (public defender paid by the government is not a state actor because she is bound by

ethical obligations to represent her client and because the state is required to honor the lawyer's independence in her representation of the defendant against the state), the Frequency Coordinator is paid for the purpose of selecting the "most appropriate frequency" for the government's consideration. §90.175(c). Because the government cannot establish an application filing procedure which provides benefits to the Frequency Coordinator in a system which violates EEC's rights, *Norwood v. Harrison*, 413 U.S. 455 (1973) (schools which are racially segregated under state law may not receive state provided text books for free), the Frequency Coordinator's alterations to PageMart's applications and subsequent dismissal of EEC's applications were improper regardless of whether frequency coordination is termed a "pre-filing procedure."[14]

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[14] The fact that the payments to the Frequency Coordinator come from the applicants seeking a federal benefit, i.e., radio spectrum, rather than directly from the government is not material. In order to obtain radio spectrum an applicant must file its applications with the Frequency Coordinator, §§ 90.175(c), 90.127(a), 1.912(b), and pay the Frequency Coordinator's application processing fee. The Frequency Coordinator thus receives benefits from the federal frequency coordination program although the payments are made by the applicants rather than the government. The lower court has determined that the Frequency Coordinator's fees are governmental expenses which are "pass[ed] on to applicants." *Brown and Schwaniger v. FCC*, 888 F.2d 898 (D.C. Cir.

(continued...)

The FCC's frequency coordination requirement is mandatory pursuant to 47 C.F.R. §§ 90.175(c), 90.127(a), 1.912(b) and "the conduct allegedly causing the deprivation of a federal right . . . [is] fairly attributable to the state." *Lugar v. Edmonston Oil Co., Inc.*, 457 U.S. 922, 937 (1982). Because the Frequency Coordinator is an agent of the federal government, EEC's procedural rights were alive even while its applications were pending with the Frequency Coordinator and even if that part of the application filing procedure were properly characterized as a "pre-filing procedure." Accordingly, PCIA and the FCC should have honored EEC's procedural rights during frequency coordination and the court of appeals incorrectly dismissed EEC's procedural rights claims as relating to a "pre-filing procedure."

B. THE COURT OF APPEALS OPINION CONFLICTS WITH PRECEDENT WHICH REQUIRES EXPLICIT NOTICE OF THE CIRCUMSTANCES WHICH WILL CAUSE DISMISSAL OF APPLICATIONS AS UNTIMELY

The court of appeals affirms the FCC's determination that the FCC's rules "provide no specific instructions for handling changes to applications while pending coordination" over EEC's objection that the silence of a rule cannot be the

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[14](...continued)
1989). *Brown & Schwaniger* appears to be the only published judicial opinion which discusses the Frequency Coordinator's role in the state actor context.

basis for inferring an amending power for the Frequency Coordinator which results in the dismissal of EEC's applications. 140 F.3d at 1050; Apdx. A-17. EEC argued that the FCC's rules relating to changes in frequencies to pending applications were clear and that they did not permit PageMart's amendments. The FCC took the other side and argued that its frequency coordination rule, §90.175(c), was unclear. From that peculiar position the FCC determined that a frequency specified on an application could be changed by the Frequency Coordinator to a frequency already being sought by another applicant. *Denial Order*, 12 FCC Rcd. at 3821; Apdx. A-17. Dismissal of EEC's applications on the basis of admittedly unclear filing rules is fundamentally unfair.

The court of appeals agrees with the FCC's construction of the pertinent cut-off rule and the court terms 47 C.F.R. §90.175(c)[15] to be an "open ended provision[]" and it finds that the *Denial Order*

> gave content to these open-ended provisions without compromising any other requirements in the rules.

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[15] Former § 90.175(c), now § 90.175(f), provides, in pertinent part, that applications seeking a 929-930 MHz frequency shall contain "a statement from the coordinator recommending the most appropriate frequency. For consistency, because the court of appeals opinion refers to former § 90.175(c) rather than § 90.175(f), EEC shall make reference to "§ 90.175(c)" herein.

> EEC has presented us with no reason to conclude that a coordinator's duty to "recommend[] the most appropriate frequency" cannot be performed by making changes directly to application materials."

140 F.3d at 1050; Apdx. A-19.

While the court of appeals notes EEC's argument that the silence of the FCC's cannot lead to the dismissal of EEC's applications, 140 F.3d at 1050; Apdx. A-16-17, the court failed to address the requirement that the FCC must provide "full and explicit notice" to applicants regarding the circumstances under which applications are subject to dismissal. The court of appeals has long held that

> *fundamental fairness . . . requires* that an exacting application standard, enforced by the severe sanction of dismissal without consideration of the merits, be accompanied by *full and explicit notice* of all prerequisites for such consideration."

Salzer v. FCC, 778 F.2d 871-72 (D.C. Cir. 1985) (emphasis added).[16] In *Salzer*, like the instant case, the FCC failed to

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[16] The United States Court of Appeals for the District of Columbia Circuit has exclusive jurisdiction to hear appeals of FCC radio licensing cases, such as the instant case, pursuant to 47 U.S.C. § 402(b). *Eastern Carolinas Broadcasting Co., et al. v. FCC*, 762 F2d 95, 100 n. 6 (D.C. Cir. 1985). Consequently, it is not possible to compare the court of appeals' decision on the notice issue to any decision of another United States circuit court; any such comparison must

(continued...)

provide applicants with notice concerning application amendment requirements. The *Salzer* court reversed the FCC's actions because "the agency failed to give adequate notice as to how and when the preference information should be submitted." 778 F.2d at 875.

Instantly, the FCC failed to give notice that PageMart's pending applications could be amended to specify a new frequency even though that frequency was already being sought by EEC. Because the FCC was not clear about its 929 MHz amendment policies, the FCC cannot dismiss EEC's applications based on those policies. When the Court found that the FCC's regulations "do not speak directly to the question," 140 F.3d at 1050; Apdx. A-18, the court should have ruled in EEC's favor. While the court of appeals may be correct when it states that the *Denial Order* clearly explains how the FCC intended its procedures to operate, 140 F.3d at

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[16](...continued)
be made with reference to the D.C. Circuit's own decisions regarding prior notice. The court of appeals decision at issue instantly does not overrule *Salzer* nor does it explain why EEC was not entitled to prior notice of the circumstances which could lead to the dismissal of its applications. In view of the constitutional notice requirements, and in view of the unique circumstance presented by § 402(b), EEC's argument should not be viewed as being argumentative with the court of appeals and Supreme Court review of this issue is appropriate notwithstanding a lack of conflict among the circuit courts of appeals.

1050; Apdx. A-18, the pertinent inquiry is not whether the FCC's order under review clearly describes, *post facto*, the workings of an admittedly vague cut-off procedure, but whether the regulation, in fact, comports with fundamental fairness by providing "full and explicit notice." The requirement is that the explanation precede, not follow, the filing of applications. *Radio Athens v. FCC*, 401 F.2d 398, 403 (D.C. Cir. 1968) (the FCC cannot rely upon post-cut-off statements to clarify filing rules).

In *State of Oregon v. FCC* the court of appeals determined that

> The FCC enforces its cut-off rules strictly in order to provide a prompt comparative hearing and to ensure that applicants are treated fairly and consistently. *Id.* at 550. We have approved the FCC's policy of strict enforcement but only "so long as 'the quid pro quo ... is explicit notice of all applicability requirements.'" Id. (quoting *Salzer v. FCC*, 778 F.2d 869, 875 (DC Cir 1985)). As we have explained before, "The dismissal of an application is a sufficiently grave sanction to trigger [the] duty to provide clear notice." *Satellite Broadcasting Co. v. FCC*, 824 F.2d 1, 3 (D.C. Cir. 1987). Accordingly, we have held that the FCC acts arbitrarily and capriciously "when it reject[s] an application as untimely based on an ambiguous cut-off provision, not clarified by FCC interpretations, if the applicant made a reasonable

effort to comply." *Florida Inst.*, 952 F.2d [549] at 550 [D.C. Cir. 1992].

102 F.3d 583, 585 (D.C. Cir. 1986).

The Supreme Court has determined that "state action affecting property must generally be accompanied by notification of that action: 'An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478, 484 (1988) citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U. S. 306, 314 (1950). The court of appeals acknowledged that the FCC's filing rules were "open-ended," 140 F.3d at 1050; Apdx. A-19, and EEC was not at all apprised that PageMart's application for 929.4875 MHz might affect EEC's ability to obtain additional authorizations on 929.7625 MHz, a frequency EEC had already placed in service. Thus, EEC did not receive the prior notice to which it was entitled regarding the circumstances under which its applications were subject to dismissal.

At oral argument FCC counsel correctly stated that *Ashbacker Radio Corp v. FCC*, 326 U.S. 327 (1945) concerned a situation in which the FCC did not adopt a cut-off rule and any competing application which was filed before a prior application was granted had to be considered. Trans., at 29. In *State of Oregon, supra*, the applicant faced "overlapping filing periods" and could not reasonably be

expected to know the appropriate cut-off rule. 102 F.3d at 586. The instant case is similar to these cases in that there was no prior "full and explicit notice" that EEC's applications were subject to dismissal pursuant to an "open-ended" "first-come/first-served" filing rule.[17] Because full and explicit notice is a matter of fundamental fairness, the court of appeals should not have permitted the FCC to dismiss EEC's applications based upon admittedly unclear application filing and processing rules.

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[17] The court of appeals indicated that because the Frequency Coordinator could fill in a blank frequency space on an application that the Frequency Coordinator must have the power to change a requested frequency. 140 F.3d at 1051; Apdx. A-22. However, the Frequency Coordinator's ability to fill in a blank begs the question of whether the Frequency Coordinator may complete the blank with a frequency already being sought by another applicant. Moreover, as the court of appeals noted, the Frequency Coordinator's ability to complete a frequency blank is specified in the *1986 Report and Order*, while the Frequency Coordinator's purported power to alter requested frequencies to cause an exclusivity problem with applications already on file is not specified anywhere.

CONCLUSION

The pertinent FCC application filing rules clearly provide that applicants must submit their applications to the Frequency Coordinator who then forwards them to the FCC. Applications not sent to the coordinator are dismissed. Because the Frequency Coordinator receives applications and makes determinations as an agent of the federal government, and because the Frequency Coordinator receives federal benefits for providing the federal government with frequency coordination services, the Frequency Coordinator is a state actor required to honor EEC's procedural rights. The court of appeals' clearly erred when it determined that numerous case law citations and FCC rules were inapplicable while applications are pending before the frequency coordinator because frequency coordination is a "pre-filing procedure."

The decisions below plainly state that the pertinent application filing and processing rules are silent on the issue of changing frequencies to application while pending coordination. EEC was not notified as to the circumstances under which its applications could be dismissed. Because the frequency amendments to PageMart's applications directly caused the dismissal of EEC's applications, and because the Frequency Coordinator made these amendments pursuant to admittedly unclear rules, it was reversible error for the court of appeals to have failed to address this matter of "fundamental fairness."

For the above reasons, Petitioner respectfully requests that this Court grant Certiorari in this case.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 97-1255 September Term, 1997

Electronic Engineering Company,
Appellant

v.

Federal Communications Commission,
Appellee

PageMart II, Inc. and Personal Communications Industry Association,
Intervenors

BEFORE: Edwards, Chief Judge; Wald, Siberman, Williams, Ginsburg, Henderson, Randolph, Rogers, Tatel and Garland, Circuit Judges

ORDER

Upon consideration of appellant's Suggestion for Rehearing In Banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the suggestion be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk
BY: /s/ Robert A. Donner
Robert A. Bonner
Deputy Clerk

FILED: June 11, 1998

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 97-1255 September Term, 1997

Electronic Engineering Company,
Appellant

v.

Federal Communications Commission,
Appellee

PageMart II, Inc. and Personal Communications Industry Association,
Intervenors

BEFORE: Edwards, Chief Judge; Wald, Siberman, Williams, Ginsburg, Henderson, Randolph, Rogers, Tatel and Garland, Circuit Judges

ORDER

Upon consideration of appellant's petition for rehearing filed May 28, 1998, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk
BY: /s/ Robert A. Donner
Robert A. Bonner
Deputy Clerk

FILED: June 11, 1998

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued February 2, 1998
Decided April 14, 1998

No. 97-1255

ELECTRONIC ENGINEERING COMPANY,
APPELLANT

v.

FEDERAL COMMUNICATIONS COMMISSION,
APPELLEE

PAGEMART II, INC. AND
PERSONAL COMMUNICATIONS INDUSTRY ASSOCIATION,
INTERVENORS

Appeal of an Order of the
Federal Communications Commission

Timothy E. Welch argued the cause and filed the briefs for appellant.

Roberta L. Cook, Counsel, Federal Communications Commission, argued the cause for appellee, with whom *Christopher J. Wright,* General Counsel, and *Daniel M.*

Armstrong, Associate General Counsel, were on the brief. *John E. Ingle,* Deputy Associate General Counsel, entered an appearance.

David E. Weisman and *Alan S. Tilles* were on the brief for intervenor Personal Communications Industry Association, Ltd.

Before: SENTELLE, TATEL and GARLAND, *Circuit Judges.*

Opinion for the court filed by *Circuit Judge* SENTELLE.

SENTELLE, *Circuit Judge*:

Electronic Engineering Company ("EEC") appeals a decision of the Federal Communications Commission allowing PageMart II, Inc. ("PageMart") to use private paging frequency 929.7625 MHZ on an exclusive nationwide basis. EEC argues that the Commission should have dismissed PageMart's applications because the Personal Communication Industry Association ("PCIA"), the frequency coordinator for 900 MHZ paging frequencies, unlawfully altered the frequency requested in PageMart's applications and submitted the amended applications to the Commission without obtaining additional signatures from PageMart. The Commission, interpreting its own rules, determined that frequency coordinators have the authority to alter a frequency request on an application before filing it with the Commission, provided that they act with the consent of the

applicant. Because we conclude that the Commission's interpretation was neither plainly erroneous nor inconsistent with the rules, we affirm.

I.

An applicant seeking to provide private land mobile radio services must obtain a frequency recommendation from a private organization known as a "frequency coordinator." A frequency coordinator, as defined by the FCC's rules governing private land mobile radio services, is simply an "entity or organization that has been certified by the Commission to recommend frequencies for use by licensees...." 47 C.F.R. § 90.7 (1994). Frequency coordinators were formed decades ago in response to FCC rules requiring that channels be used on a shared basis, and requiring that users and applicants cooperate in the selection and use of the frequencies to minimize interference. *See In re Frequency Coordination in the Private Land Mobile Radio Services,* 103 F.C.C.2d 1093, 1095 (1986) ("Report and Order"). To facilitate this process, interested parties organized frequency coordinating committees, which were comprised of entities using their services so that the recommendations would be both knowledgeable and impartial. *Id.*

The FCC formally recognized the role that frequency coordinators play in the selection process in 1958. The Commission first adopted rules simply providing that

applicants could obtain frequency recommendations from these committees, and that the Commission would consider their recommendations when making assignment decisions. *In re Amendment of Part 11, Rules Governing the Industrial Radio Services, To Delete, Modify and Create Services and To Effect Changes in the Availability of Frequencies, First Report and Order*, 23 Fed. Reg. 4784 (1958). In 1969, the Commission issued a Memorandum Opinion and Order that further clarified the role of frequency coordinators. The order makes clear, among other things, that a frequency coordinator must not discriminate between members and non-members, and that a coordinator's recommendation is not binding on either the applicant or the Commission. *In re Amendment of Section 91.8(a)(2) and (a)(3) of the Commission's Rules Relating to Frequency Coordination in the Industrial Radio Service*, 16 F.C.C.2d 299, 305-06 (1969).

In 1982, Congress amended the Communications Act and affirmed the FCC's authority to use frequency coordinators in the spectrum management process. 47 U.S.C. § 332(b)(1). The Commission subsequently revised its rules to improve the quality and efficiency of frequency selections. The amended rules provide that all applicants for private land mobile licenses that require frequency coordination must send their applications to the certified frequency coordinator. 47 C.F.R. §§ 1.912(b), 90.127(a). The coordinator is then required to perform appropriate coordination services. *Id.* The rules make clear that each application for frequencies in the 929-930 MHZ band, the band at issue in this case, must

include a "statement from the coordinator recommending the most appropriate frequency." 47 C.F.R. § 90.175(c). The frequency coordinator then forwards the application along with the frequency recommendation to the Commission for evaluation and decision. 47 C.F.R. §§ 1.912(b), 90.127(a).

The Report and Order that announced the new rules further elaborated upon the frequency coordination process. An applicant must send its completed application to the certified frequency coordinator (a single coordinator is certified for each service), rather than to the Commission. 103 F.C.C.2d at 1100, 1104-05. When submitting materials, the applicant can either request a particular frequency, or leave the selection of the frequency entirely to the coordinator. *Id.* at 1096-97, 1147. An applicant that requests a particular frequency must submit a technical justification for that frequency along with the application. *Id.* at 1147. Upon receiving the applications, the frequency coordinator is required to process the submissions in the order of receipt. *Id.* at 1104, 1119. The coordinator checks each application for "completeness, accuracy, and compliance with the Commission's rules." *Id.* at 1100. If the coordinator encounters an application that is incomplete or contains minor errors, the coordinator is authorized to make the necessary corrections with the applicant's approval. *Id.* at 1147. After reviewing the application, the coordinator evaluates the channel availability and identifies the most suitable frequency for that particular applicant. *Id.* at 1100, 1119. The coordinator then files the application, along with the

frequency recommendation, directly with the Commission. Id. at 1100, 1104-05. If the coordinator disagrees with the frequency requested by the applicant, and if the applicant disapproves of the coordinator's recommendation, the coordinator must submit the application, the technical submission, the coordinator's written reasons for rejection, and the alternate frequency recommendation to the Commission. Id. at 1147-48.

All private paging systems were assigned on a shared basis until 1993, when the Commission amended its rules governing the 929-930 MHZ band to grant channel exclusivity to qualified local, regional, and national paging systems.[1] Under the amended rules, incumbent systems had the first chance to obtain exclusivity rights. Incumbents were allowed thirty days from the date of the order to submit a request for exclusivity to PCIA (formerly known as the National Association of Business and Educational Radio, Inc., or "NABER"), the frequency coordinator for the 900 MHZ private paging systems. Upon receipt of the requests, PCIA was required to review the submissions and then forward

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[1] *In re Amendment of the Commission's Rules To Provide Channel Exclusivity To Qualified Private Paging Systems at 929-930 MHZ*, 8 F.C.C.R. 8318 (1993). The Commission has recently abandoned its exclusivity rules and implemented a new geographic licensing system. *In re Revision of Part 22 and Part 90 of the Commission's Rules To Facilitate Future Development of Paging Systems*, 12 F.C.C.R. 2732 (1997). That rule change, however, has no bearing on the Commission's decision in this particular case.

requests that satisfied the exclusivity criteria to the Commission for review and approval. Incumbent systems that satisfied the criteria would have exclusivity rights with respect to their existing authorizations as of the effective date of the rules. After the thirty-day transition period, PCIA would begin to process applications for exclusive licenses on a first-come, first-served basis, regardless of whether the applicant was an incumbent or a new entrant. However, all incumbents, regardless of whether they qualified for exclusivity, would be grandfathered with respect to their existing systems, so that no incumbent would have to relocate, change frequencies, or otherwise curtail previously authorized construction or operations.

On February 21, 1994, after the transition period had expired, PageMart submitted applications to PCIA for over three hundred sites, a sufficient number to qualify for an exclusive nationwide paging system. PageMart specifically requested to use frequency 929.4875 MHZ. Over the next few months, PageMart submitted additional applications, requesting a total of 429 sites on the 929.4875 MHZ frequency. On March 15, 1994, PCIA received PageMart's request for nationwide exclusivity on frequency 929.4875 MHZ for the sites requested in previous applications. That same day, PCIA also received applications from EEC that sought to expand its existing system on 929.7625 MHZ by twelve sites. Although EEC's existing system of thirty-eight sites had been eligible for local exclusivity during the transition period, EEC did not submit a request for exclusivity

during that period of time. Indeed, EEC did not submit a request for exclusivity until October 17, 1994.

In May of 1994, PCIA began to evaluate the applications that PageMart had submitted the previous February. PCIA determined that the 929.4875 MHZ frequency could not be coordinated on an exclusive nationwide basis because it had already been assigned to three exclusive regional systems. PCIA ultimately decided that 929.7625 MHZ was the most appropriate frequency for use by PageMart on a national exclusive basis, because there were only a few exclusive local systems on that channel, and because no other channel was entirely clear and available for nationwide exclusive use. With PageMart's consent, PCIA crossed out the frequency requested in PageMart's applications and exclusivity request and inserted frequency 929.7625 MHZ. PCIA then filed PageMart's applications with the Commission.

A few weeks later, PCIA reached EEC's applications in the queue and considered its request for expanded usage of the 929.7625 MHZ frequency. PCIA concluded that it could not approve EEC's request because it had already recommended PageMart's use of that frequency on an exclusive nationwide basis. As a result, EEC could continue to operate its existing sites on the 929.7625 MHZ frequency on a grandfathered basis, but could not expand its use of that frequency if the FCC approved PageMart's applications.

EEC eventually filed a petition with the Licensing Division of the FCC's Wireless Telecommunications Bureau,

seeking dismissal of PageMart's request for nationwide exclusivity because of alleged procedural irregularities. EEC objected to the fact that "an unidentified party has crossed out PageMart II, Inc.'s typewritten request for '929.*4875* ' MHZ and pencilled in '929.7625' " on PageMart's exclusivity request and on its applications. EEC contended that serious issues were raised concerning who changed PageMart's materials and when. PageMart responded that the frequency coordinator had made the changes before forwarding PageMart's applications to the Commission. PageMart further declared that PCIA had simply processed the applications in the order of receipt and had recommended that PageMart be allowed to use 929.7625 MHZ. EEC replied that frequency coordinators lack the authority to alter applications or exclusivity requests, and also alleged that PCIA had shown unfair favoritism to PageMart. By a letter order, the Bureau's Land Mobile Division concluded that PCIA's handling of PageMart's applications was consistent with 47 C.F.R. § 90.175, even though the rule does not "provide specific procedures for amending applications while pending coordination."

EEC filed an Application for Review with the Commission. EEC once again argued that PCIA had no authority to alter PageMart's applications without obtaining additional signatures, and that PCIA had shown improper favoritism to PageMart. The Commission concluded that PCIA's actions were consistent with its obligations as a frequency coordinator and accordingly denied review. *In re*

Electrical Engineering Co. and PageMart II, Inc. Requests for Exclusivity on 929.7625 MHZ, 12 F.C.C.R. 3819 (1997) ("Denial Order"). The Commission first concluded that PCIA acted within its authority when it changed the frequency requested on PageMart's applications. The Commission ruled that a frequency coordinator's authority to alter application materials derives from its duty to select the most appropriate frequency for each particular applicant. The Commission further concluded that there was no basis in the record to support the allegation that the applications submitted by PageMart and EEC received disparate treatment by PCIA. Id. at 3821-22.

EEC filed a timely appeal in this court.

II.

EEC challenges the Commission's decision under section 706(2)(A) of the Administrative Procedure Act, which requires us to hold unlawful and set aside any agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). To prevail on its claim, EEC must overcome the highly deferential standard of review that we accord to an agency's interpretation of its own rules. *Bluestone Energy Design, Inc. v. FERC*, 74 F.3d 1288, 1292 (D.C. Cir. 1996). Provided that it does not violate the Constitution or a federal statute, the agency's interpretation is entitled to controlling weight "unless it is plainly erroneous or inconsistent with the regulation."

Stinson v. United States, 508 U.S. 36, 45 (1993) (internal punctuation and citation omitted). We conclude that the Commission's decision easily survives this deferential standard of review.

A.

We begin with EEC's claim that PCIA had no authority to alter PageMart's applications and submit materials to the Commission without obtaining additional signatures from a PageMart representative.

EEC first makes an argument based on the authority of frequency coordinators to correct clerical errors in applications. The Commission's 1986 Report and Order recognized that frequency coordinators have the power to correct minor errors in an application before forwarding it to the Commission: "In cases where the application submitted to the coordinator is incomplete or if there is an obvious error, we are allowing the coordinator to make the necessary corrections provided that applicant approval is obtained. Again, we believe allowing the coordinator to make minor changes will speed up the overall licensing process." 103 F.C.C.2d at 1147. EEC argues that PageMart's original request for the 929.4875 MHZ frequency was not the sort of "obvious" error that frequency coordinators have the authority to "correct." Rather, EEC continues, PageMart's selection of 929.4875 MHZ was a deliberate act, as evidenced by the consistent reference to this frequency in its applications and

in its nationwide exclusivity request. EEC contends that the Commission, by approving PCIA's changes even though they did more than correct minor errors, effectively transformed the coordinators' limited authority into an all-inclusive amending power that extends to even the most substantive changes to an application.

The simple answer to EEC's objection is that PCIA did not make those changes pursuant to its authority to correct clerical errors. Frequency coordinators perform a variety of functions in the spectrum management process. Correcting clerical errors is one of those functions, but so is the selection of the most appropriate frequency for use by each particular applicant. 47 C.F.R. § 90.175(c); 103 F.C.C.2d at 1100. PCIA made changes to PageMart's applications as part of its responsibility to select the most appropriate frequency. PCIA determined that the 929.4875 MHZ frequency would not be suitable for use by PageMart because other systems were operating on an exclusive regional basis on that channel. PCIA decided that the 929.7625 MHZ frequency was the appropriate frequency for PageMart, and made changes to its applications only after receiving PageMart's consent to do so. While it may be the case that a coordinator does not have unlimited power to correct application errors, PCIA did not purport to correct errors in PageMart's applications, but rather carried out its responsibility to select the most appropriate frequency for this particular applicant.

EEC also faults the Commission for relying on the silence of its rules as a basis for concluding that PCIA acted

within its authority as a frequency coordinator. EEC draws special attention to the following passage in the Commission's order:

> Rule 90.175(c) provides no specific instructions for handling changes to applications while pending coordination, and allows the frequency coordinator to recommend the most appropriate frequency. Other rule sections cover the execution of applications and amendments of applications before the Commission. Rule 90.175(c), however, does not explicitly incorporate those rule sections in connection with changes made to a proposal during pre-filing procedures while still before the coordinator. Thus, absent evidence that the changes made were without authority of the applicant, or were made subsequent to the frequency coordinator's submission of the applications to the Commission, PageMart's applications and related exclusivity request for use of 929.7625 MHZ were properly accepted for filing.

12 F.C.C.R. at 3821-22. In EEC's view, the silence of Rule 90.175(c) must be construed as a denial, not a grant, of power to frequency coordinators such as PCIA. Absent express authorization from the rules, EEC argues, coordinators lack

the authority to amend applications and send them directly to the Commission. We disagree.

The Commission's reasoning in the Denial Order is quite clear. As the Commission explained, rule 90.175(c) provides that applications for frequencies in the 929-930 MHZ band must include a "statement from the coordinator recommending the most appropriate frequency," but does not specify how the coordinator is to proceed when making its recommendation. 47 C.F.R. § 90.175(c). Nor does the rule elsewhere outline specific procedures that a frequency coordinator must follow when making changes to applications before they are filed with the Commission. Even the Commission's 1986 Report and Order does not speak directly to the question at hand. The Report and Order does explain how the coordinator is to proceed in one specific circumstance: if the coordinator disagrees with an applicant's frequency request, and if the applicant wants to pursue its request with the Commission, the coordinator is required to forward the application, the technical submission, the coordinator's written reasons for rejection, and the alternate frequency recommendation to the Commission. 103 F.C.C.2d at 1147-48. The Report and Order does not, however, specify how the coordinator is to proceed if the applicant agrees that the frequency selected by the coordinator is preferable to the frequency originally requested by the applicant.

After acknowledging that the rules do not speak directly to the question, the Commission returned to the basic requirement that coordinators recommend the "most

appropriate frequency" for each particular applicant. 47 C.F.R. § 90.175(c). The Commission ultimately decided that altering a frequency request on an application was an acceptable way to make a frequency recommendation, provided that the applicant approves the changes in advance of filing the applications with the Commission. 12 F.C.C.R. at 3821-22. We conclude that the Commission's interpretation was neither "plainly erroneous" nor "inconsistent with the regulation." *Stinson,* 508 U.S. at 45. The rules require coordinators to make frequency recommendations, but do not specify how they are to proceed in every conceivable circumstance. The Commission's reading gave content to these open-ended provisions without compromising any other requirements in the rules. EEC has presented us with no reason to conclude that a coordinator's duty to "recommend[ ] the most appropriate frequency" cannot be performed by making changes directly to application materials. 47 C.F.R. § 90.175(c). Accordingly, we defer to the Commission's interpretation that a coordinator may recommend a frequency by making changes to an application, with the applicant's consent, before forwarding the materials to the Commission.

Equally unavailing is EEC's argument that a frequency coordinator cannot alter an application without obtaining an additional signature from the applicant. EEC cites to a number of provisions in the rules that purportedly required PCIA to return PageMart's applications and exclusivity request for additional signatures. For example, EEC draws

our attention to section 90.131(a), which provides that "[e]ach amendment to an application shall be signed and submitted in the same manner as required for the original application." 47 C.F.R. § 90.131(a); *see also* §§ 1.743(a), 1.913(a). EEC also cites to a few cases before the Commission in which the FCC mentioned a signature requirement. *See, e.g., R & L Broadcasters,* 8 F.C.C.R. 7031, 7032 (1993); *WMOZ, Inc.,* 36 F.C.C. 202, 218 (1964). In EEC's view, a change in frequency constitutes an amendment to the original application, and thus requires the coordinator to obtain an additional signature before forwarding the amended application to the Commission.

None of the rules cited by EEC requires frequency coordinators to jump through this additional procedural hoop. As the Commission explained, the rules relied upon by EEC govern amendments to applications that have been filed with the Commission. 12 F.C.C.R. at 3821. Frequency coordination, however, is clearly a pre-filing procedure. Frequency coordinators are to file the applications directly with the Commission after they have performed "appropriate frequency coordination." 47 C.F.R. §§ 1.912(b), 90.127(a); 103 F.C.C.2d at 1104-05. Contrary to EEC's assumption, applications are not considered to be filed with the Commission when they are received by the coordinator, but only when they are received by the Commission at its designated location. 47 C.F.R. § 1.7 (1997). At the time that it altered PageMart's applications, PCIA obviously had not

filed the applications with the Commission, and thus PCIA was not bound by rules that govern post-filing amendments.

The cases cited by EEC are off the mark. Two of the cases, like the rules cited by EEC, concerned amendments to applications already filed with the Commission. *R & L Broadcasters*, 8 F.C.C.R. at 7032; *CSJ Investments, Inc.*, 5 F.C.C.R. 3741, 3742 (Rev. Bd. 1990). Two others involved applicants who attested to the contents of their applications even though the applications were not complete at that time. *Johnston Broadcasting Co. v. FCC*, 175 F.2d 351, 354 (D.C. Cir. 1949); *WMOZ, Inc.*, 36 F.C.C. 201, 218 (1964). The last case cited by EEC discussed whether it was proper to dismiss applications containing only facsimile signatures instead of handwritten signatures. *SBM Communications, Inc.*, 7 F.C.C.R. 3436, 3436 (1992). Not only did none of these cases purport to discuss whether frequency coordinators are required to obtain additional signatures from applicants when making changes to applications, none of them involved frequency coordinators at all.

Moreover, the 1986 Report and Order undermines the notion that frequency coordinators must obtain additional signatures. The Order requires frequency coordinators to forward applications directly to the Commission, but makes no mention of returning material to applicants to gain approval of their frequency recommendations. 103 F.C.C.2d at 1104-05. Indeed, the Commission initially proposed that a coordinator return an application if it disagrees with a request for a specific frequency, but ultimately decided

against this proposal in its final rules. *See Frequency Coordination in the Private Land Mobile Radio Services*, 49 Fed. Reg. 45454, 45457 (proposed Nov. 16, 1984); 103 F.C.C.2d at 1100, 1147-48. Even more illuminating is the procedure for handling applications that do not request any particular frequency. The Report and Order makes clear that applicants are free to request a specific frequency, but are under no obligation to do so. 103 F.C.C.2d at 1096-97, 1147. The rules contemplate, in other words, that some applicants will send their materials to frequency coordinators with blank frequency requests. Frequency coordinators, consistent with their obligation to recommend the most appropriate frequency, fill in the blank frequency requests and forward the applications directly to the Commission for review and approval. The Commission accepts such applications for filing, even though the applicant did not request any particular frequency, and even though the coordinator inserted a frequency in the applicant's materials without obtaining an additional signature. If a frequency coordinator can fill in a blank frequency request without an additional signature, we see no reason why an additional signature would be required if the coordinator, acting with the consent of the applicant, changes the frequency request in an applicant's materials before forwarding the application to the Commission.

Finally, EEC argues that PageMart's applications must be considered untimely vis-a-vis EEC's applications for 929.7625 MHZ even though PageMart submitted applications to PCIA before EEC submitted its applications. The basis for

this argument is a rule providing that an application that is "substantially amended" will be considered newly filed as of the date of the filing of the amendment. 47 C.F.R. § 1.918(b); *see also* 47 C.F.R. § 90.165(d)(1) (1997). EEC cites to a number of scattered provisions, many of which do not involve private radio services, to make the point that a change in frequency constitutes a substantial amendment to an application. *See* 47 C.F.R. §§ 1.962(c)(1), 73.3571(a)(1), 73.3572(a)(1)(i), 73.3573(a)(1), 74.911(a)(1), 74.1233(a)(1); *see also* §§ 22.123(e)(6), 90.164(a), 90.165(d) (1997). EEC concludes from these provisions that PCIA's changes to PageMart's applications amounted to substantial amendments, which moved PageMart's applications to the end of the queue and thus behind the application submitted by EEC.

Like the argument about the signature requirement, this argument fails because the rules cited by EEC apply to applications that have been filed with the Commission. *See, e.g.*, 47 C.F.R. § 1.962(c) (referring to a "substantial amendment of an application *on file*") (emphasis added). Nothing in rule 90.175, which outlines the requirements for frequency coordination, gives any indication that the Commission incorporated these provisions and imposed such procedural strictures on frequency coordinators. 47 C.F.R. § 90.175. Moreover, the logical consequence of EEC's argument would be to move an application to the end of the queue whenever the applicant agrees that the frequency selected by the coordinator is preferable to the frequency originally requested by the applicant. This cumbersome result

would seem to be in tension with the more specific mandate that frequency coordinators process applications "in order of receipt." 103 F.C.C.2d 1104, 1119. Furthermore, various parts of the Report and Order mention the need to give frequency coordinators flexibility in carrying out their coordination responsibilities. 103 F.C.C.2d at 1109, 1115. Absent an express provision in the rules, there would seem to be little reason to encumber the coordinator's task by requiring it to move to the end of the queue applications that the coordinator has already considered. In sum, the Commission did not err when it concluded that the provisions cited by EEC did not require PCIA to move PageMart's applications to the end of the queue.

B.

EEC next charges that PCIA violated the Commission's rules requiring coordinators to handle applications in a non-discriminatory manner by affording disparate treatment to the EEC and PageMart applications. 103 F.C.C.2d 1101-02. EEC contends that PCIA went the extra mile for PageMart when coordinating its applications, but failed to provide even basic assistance to EEC. EEC asserts, for example, that PCIA recommended an alternative frequency to PageMart when 929.4875 MHZ was unavailable but made no similar efforts on behalf of EEC. EEC faults the Commission for returning its applications without even searching for an alternative frequency. EEC also complains

that PCIA delayed processing its applications, failed to explain the reason for the delay, and did not inform EEC why its applications could not be coordinated as requested. EEC speculates that PageMart received favorable treatment because PageMart, unlike EEC, is a member of PCIA and pays significant membership and coordination fees to the organization.

EEC's depiction of the facts does not square with the record, which reveals that PCIA processed the applications in full compliance with the Commission's rules. PCIA, like all frequency coordinators, had a duty to process the applications in the order of receipt. 103 F.C.C.2d at 1100, 1104, 1119. PageMart's applications arrived almost a month before EEC's applications, so PCIA naturally considered PageMart's applications first. PCIA determined that the frequency requested by PageMart would not be suitable for nationwide exclusive use because several regional systems already operated on that channel on an exclusive basis. PCIA recommended an alternative frequency, 929.7625 MHZ, for use by PageMart because there were only a few exclusive local systems on that frequency and because no other channel was entirely clear and available for nationwide use. With Page- Mart's approval, PCIA crossed out the frequency requested by PageMart and inserted a request for 929.7625 MHZ, then filed the applications with the Commission.

When it reached EEC's applications in the queue, PCIA could not approve the request for expanded usage of 929.7625 MHZ because it had already sanctioned PageMart's

use of that channel on an exclusive nationwide basis. PCIA promptly notified EEC that it could not expand its system on 929.7625 MHZ due to the assignment of that channel to PageMart. EEC responded by asking PCIA to hold its applications while it attempted to obtain a co-channel concurrence agreement with PageMart. PCIA returned EEC's applications only after two months had elapsed without receiving any update from EEC regarding the status of its applications. In sum, the record reveals that the process worked precisely the way that it is intended to operate: the frequency coordinator processed the applications on a first-come, first-served basis, gave expeditious review to the applications, and informed the applicants of the status of their submissions in a prompt manner. PCIA cannot be faulted for failing to recommend an alternative frequency to EEC, given EEC's request to put the applications on hold while it negotiated a deal with PageMart. There is simply nothing in the record to support EEC's allegation that PCIA breached its duty to process applications with "total impartiality." 103 F.C.C.2d at 1101.

C.

Finally, EEC criticizes the Commission for failing to explain why 929.7625 MHZ was the most appropriate frequency for use by PageMart. EEC points out that the Denial Order only briefly mentioned the coordinator's reasons for recommending 929.7625 MHZ: "PCIA ultimately

determined that the best choice for PageMart's nationwide system would be 929.7625 MHZ because there were only a handful of exclusive local systems on that channel, and there were no alternative totally clear channels available." 12 F.C.C.R. at 3820. EEC contends that the Commission did not engage in reasoned decisionmaking because it offered an inadequate justification for the selection of this particular frequency. However, EEC did not contest the frequency selected by PCIA in its arguments before the Commission, which helps to explain why the Commission gave this issue only brief attention in its Denial Order. EEC also neglected to file a petition for reconsideration of the FCC's order to challenge the selection of this particular frequency. Under applicable law, we have no authority to address the merits of an allegation of error that EEC failed to raise in the proceedings before the Commission. 47 U.S.C. § 405(a); *American Tel. & Tel. Co. v. FCC*, 974 F.2d 1351, 1354 (D.C. Cir. 1992) ("We have construed this section as codifying the exhaustion of administrative remedies doctrine, which requires complainants, before coming to court, to give the FCC a fair opportunity to pass on a legal or factual argument.") (internal punctuation and citation omitted).

III.

For the reasons set forth above, the decision of the Commission is affirmed.

APPENDIX B

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D. C. 20554

In the Matter of	)
	)
Electrical Engineering Company and PageMart II, Inc.	)
	)
Requests for Exclusivity on 929.7625 MHZ	)
	)

MEMORANDUM OPINION AND ORDER

Adopted: March 20, 1997 Released: March 27, 1997

By the Commission:

Introduction and Executive Summary

1. On July 3, 1995, Electronic Engineering Company (EEC) filed an Application for Review, challenging, the June 1, 1995, decision of the Land Mobile Branch of the Licensing Division of the Wireless Telecommunications Bureau (Bureau) denying EEC's October 14, 1994, Petition to

Dismiss 929 MHZ Exclusivity Request, filed against PageMart II, Inc. (PageMart).[2] EEC asserts that Personal Communications Industry Association (PCIA)[3] engaged in improper coordination practices when it recommended frequency 929.7625 MHZ to the Commission for use by PageMart rather than for use by EEC. For the reasons that follow, the Application for Review is denied.

Background

2. On February 21, 1994, PageMart submitted applications to PCIA requesting use of frequency 929.4875 MHZ for 309 sites. Over the next few months, PageMart submitted additional applications to PCIA, requesting a total of 429 sites on 929.4875 MHZ. On March 14, 1994, EEC submitted applications to PCIA, seeking to expand its existing system on another paging frequency, 929.7625 MHZ. On March 15, 1994, PageMart submitted to PCIA a request for nationwide exclusivity on 929.4875 MHZ, to accompany the applications which it had previously submitted for use of that frequency. On April 14, 1994, EEC submitted additional

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[2]Letter from Michael J. Regiec, Deputy Chief, Land Mobile Branch, Licensing Division, to Timothy E. Welch, counsel to Electronic Engineering, Company, dated June 1, 1995.

[3]PCIA is a Certified Frequency Coordinator formerly known as the National Association of Business and Educational Radio (NABER).

applications to PCIA seeking to implement its proposal to expand its paging system.

3. During the first week of May, 1994, PCIA began to evaluate the PageMart applications which had been filed with PCIA on February 21, 1994, and determined that 929.4875 MHZ could not be coordinated for a nationwide system because that frequency had already been assigned to another applicant for three exclusive regional systems. PCIA ultimately determined that the best choice for PageMart's nationwide system would be 929.7625 MHZ because there were only a handful of exclusive local systems on that channel, and there were no alternative totally clear channels available. PageMart authorized PCIA to amend its applications and nationwide exclusivity request to reflect a request for use of the 929.7625 MHZ frequency. PageMart's applications were then submitted to the Commission by PCIA during the first week of May, 1994.

4. During the third week of May, 1994, PCIA began to review the EEC applications and determined that 929.7625 MHZ could not be coordinated for EEC's use on its non-exclusive system, due to the assignment of the frequency to PageMart on an exclusive basis. On October 14, 1994, EEC filed a Petition to Dismiss PageMart's 929 Exclusivity Request (Petition), with the Land Mobile Branch of the Bureau's Licensing, Division. On October 17, 1994, PCIA returned the applications to EEC, because a co-channel concurrence agreement between EEC and PageMart had not

been received by PCIA. By a letter ruling, dated June 1, 1995, pursuant to delegated authority, the Land Mobile Branch denied EEC's Petition on the basis that EEC had not filed a request for local or regional exclusivity, nor did EEC have enough stations to qualify for regional exclusivity, at the time that PageMart filed its exclusivity request.[4]

5. On July 3, 1995, EEC filed an application for review of the Branch's June 1, 1995, denial of its Petition. EEC argues that PCIA "substantially altered" PageMart's applications and related frequency exclusivity request by changing the requested frequency from 929.4875 MHZ to 929.7625 MHZ, without first obtaining the signature of the applicant prior to submitting PageMart s applications and exclusivity request to the Commission.[5] EEC also alleges that the Bureau improperly permitted PCIA to make the frequency change.[6]

6. On July 18, 1995, PageMart filed an opposition to EEC's application for review. In response to EEC's allegations, PageMart argues that it had not received preferential treatment in the coordination process. PageMart argues that it submitted its applications and a request for exclusivity prior to EEC, allowing PCIA to recommend

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[4]*See* footnote 1 *supra*.

[5]*See* Application for Review, filed by EEC on July 3, 1995, at para. 13.

[6]*See id.* at paras. 14 - 17.

frequency 929.7625 MHZ to PageMart because EEC had not filed a request for local or regional exclusivity on frequency 929.7625 MHZ, nor did it have sufficient stations to qualify for local exclusivity.[7] PageMart additionally argues that Section 90.175(c) of the Commission's Rules[8] does not address procedures internal to PCIA's coordination efforts when handling changes to applications while pending coordination, and any changes made to its applications by PCIA were made under PageMart's authority.[9]

7. On August 2, 1995, EEC filed a reply to PageMart's opposition to its July 18, 1995, Application for Review. In response to PageMart's allegations, EEC argues that PCIA favored PageMart over EEC, to the detriment of EEC, by allowing PageMart to make improper "major amendments" to its applications.[10] EEC also asserts that it was "first-in-line" for frequency 929.7625 MHZ because PageMart's applications were not properly amended prior to the time that

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[7] *See* Opposition to Application for Review, filed by PageMart on July 18, 1995, at paras. 4 & 6.

[8] 47 C.F.R. § 90.175(c).

[9] *See* Opposition to Application for Review at paras. 1 & 3.

[10] *See* Reply to Opposition to Application for Review, filed by EEC on August 2, 1995, at paras 2 & 5.

PCIA recommended to the Commission that PageMart be licensed on the frequency.[11]

Discussion

8. EEC asserts that a frequency coordinator is only authorized to change the frequency requested on an application, if the applicant signs the amended application.[12] EEC also asserts that the Bureau committed error by permitting PCIA, a purportedly neutral frequency coordinator, to make a change in frequency on PageMart's applications and frequency exclusivity request, without first obtaining PageMart's signature on the changed applications and application materials.[13] We find that Section 90.175(c) of our Rules, which governs frequency coordination for 929-930 MHZ frequencies, does not provide any specific procedures for changes in applications made by a frequency coordinator. Rule 90.175(c) addresses the requirements for coordination itself, not the internal procedures to be used by frequency coordinators. Rule 90.175(c) provides no specific instructions for handling changes to applications while pending, coordination, and allows the frequency coordinator

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[11] *See id.* at para. 6.

[12] *See* Application for Review at para. 13.

[13] *See* Application for Review at paras. 15 - 17.

to recommend the most appropriate frequency. Other rule sections cover the execution of applications and amendments of applications before the Commission. Rule 90.175(c), however, does not explicitly incorporate those rule sections in connection with changes made to a proposal during pre-filing procedures while still before the coordinator. Thus, absent evidence that the changes made were without authority of the applicant, or were made subsequent to the frequency coordinator's submission of the applications to the Commission, PageMart's applications and related exclusivity request for use of 929.7625 MHZ were properly accepted for filing.

9. We conclude that PageMart received no preferential treatment in the coordination process. PCIA was authorized by the Commission to process 900 MHZ paging license applications Chronologically.[14] PCIA processed the applications in order of receipt, consistent with the long, established standard for coordinators. PageMart was the first in line, having filed its applications with PCIA in the period between October, 1993, and February, 1994, and its request for exclusivity in March, 1994. PCIA had the discretion to chancre the frequency requested by PageMart to the most appropriate one, prior to the filing of PageMart's applications with the Commission. Because the chancre in frequency was

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[14] *See* Amendment of the Commission's Rules to Provide Channel Exclusivity to Qualified Private Paging Systems at 929-930 MHZ, 8 FCC Rcd 8318, 8330 (1993) (para. 32).

made by PCIA prior to the time the applications were filed with the Commission, the change in frequency did not constitute a substantial application amendment which would require an approving, signature of a PageMart principal. As a general matter, incumbent licensees are required to submit a request for designation of exclusive status to the frequency coordinator.[15] In the instant case, 929.4875 MHZ was not available on a nationwide basis in early May, 1994, the time of processing of PageMart's earlier-filed applications. As a proper pre-FCC filing procedure, PCIA recommended that PageMart use the 929.7625 MHZ frequency. Although EEC did apply to expand its operations on 929.4875 MHZ, it failed to file an exclusivity request with PCIA until October 17, 1994.

10. It is the responsibility of PCIA, as frequency coordinator of the 900 MHZ paging services, to file 929-930 MHZ applications with the Commission.[16] We note that there may be an occasion, such as in the instant case, when the frequency coordinator exercises its authority and recommends a different frequency than that requested by the applicant. In the Report and Order modifying the procedures by which most of the frequencies allocated to the private land mobile radio services are assigned to individual applicants, the

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[15]*See id.* at 8333, para. 42.

[16]*See id.* at para. 23; Frequency Coordination in the Private Land Mobile Radio Services, 103 FCC 2d 1093 (1986) at para. 40.

Commission stated, "Although we are giving coordinators greater discretion in choosing frequencies, we believe coordinators need this flexibility to maximize the use of the spectrum."[17] We do not believe that PCIA acted improperly in recommending the 929.7625 MHZ frequency to PageMart. Instead, we believe that PCIA's actions were appropriate and consistent with its obligations as a frequency coordinator.

Conclusion

1. For the above reasons, IT IS ORDERED that Electronic Engineering Company's Application for Review IS HEREBY DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

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[17] *See id.* at para. 31

APPENDIX C

PERTINENT STATUTORY & REGULATORY PROVISIONS

U. S. Const. Amend V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment or a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

47 U.S.C. §§ 308(a)

The Commission may grant construction permits and station licenses, or modifications or renewals thereof, only upon written application therefor received by it: Provided, that (1) in cases of emergency found by the Commission involving danger to life or property or due to damage to equipment, or (2) during a national emergency proclaimed by the President or declared by the Congress and during the continuance of any war in which the United States is engaged and when such action is necessary for the national defense or security or otherwise in furtherance of the war effort, or (3) in cases of emergency where the Commission finds, in the nonbroadcast services, that it would not be feasible to secure renewal

application from existing licensees or otherwise to follow normal licensing procedure, the Commission may grant construction permits and station licenses, or modifications or renewals thereof, during the emergency so found by the Commission or during the continuance of any such national emergency or war, in such manner and upon such terms and conditions as the Commission shall by regulation prescribe, and without the filing of a formal application, but no authorization so granted shall continue in effect beyond the period of the emergency or war requiring it: Provided further, that the Commission may issue by cable, telegraph, or radio a permit for the operation of a station on a vessel of the United States at sea, effective in lieu of a license until said vessel shall return to a port of the continental United States.

47 U.S.C. §§ 308(b)

All applications for station licenses, or modifications or renewals thereof, shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and financial, technical and other qualifications of the applicant to operate the station; the ownership and location of the proposed station and of the stations, if any, with which it is proposed to communicate; the frequencies and the power desired to be used; the hours of the day or other periods of time during which it is proposed to operate the station; the purposes for which the station is to be used; and

such other information as it may require. The Commission, at any time after the filing of such original application and during the term of any such license, may require from an applicant or licensee further written statements of fact to enable it to determine whether such original application should be granted or denied or such license revoked. Such application and/or such statement of fact shall be signed by the applicant and/or licensee in any manner or form, including by electronic means, as the Commission may prescribe by regulation.

47 U.S.C. §§ 309(a)

Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which Section 308 applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience and necessity would be served by the granting thereof, it shall grant such application.

47 U.S.C. §§ 309(e)

If, in the case of any application to which subsection (a) of this section applies, a substantial material question of fact is

presented or the Commission for any reason is unable to make the finding specified in such subsection, it shall formally designate the application for hearing on the ground or reasons then obtaining and shall forthwith notify the applicant and all other known parties in interest of such action and the grounds and reasons therefor, specifying with particularity the matters and things in issue but not including issues or requirements phrased generally. When the Commission has so designated an application for hearing the parties in interest, if any, who are not notified by the Commission of such action may acquire the status of a party to the proceeding thereon by filing a petition for intervention showing the basis for their interest not more than thirty days after publication of the hearing issues or any substantial amendment thereto in the Federal Register. Any hearing subsequently held upon such application shall be a full hearing in which the applicant and all other parties in interest shall be permitted to participate. The burden of proceeding with the introduction of evidence and the burden of proof shall be upon the applicant, except that with respect to any issue presented by a petition to deny or a petition to enlarge the issues, such burdens shall be as determined by the Commission.

47 C.F.R. § 0.401 (b)

Applications or filings requiring the fees set forth at Part 1, Subpart G of the rules must be delivered to the Commission's

lockbox bank in Pittsburgh, Pennsylvania with the correct fee and completed Fee Form attached to the application or filing, unless otherwise directed by the Commission. In the case of any conflict between this rule subpart and other rules establish filing locations for submissions subject to a fee, this subpart shall govern.

47 C.F.R. § 1.7

Documents are filed upon receipt. Unless otherwise provided in this Title, by Public Notice, or by decision of the Commission, or of the Commission's staff acting on delegated authority, pleadings and other documents are considered to be filed with the Commission upon their receipt at the location designated by the Commission.

47 C.F.R. § 1.912(b)

All applications for private land mobile licenses which require both frequency coordination and fees as set forth at Part 1, Subpart G of this chapter shall first be sent to the certified coordinator for the radio service or frequency group concerned. After the appropriate frequency coordination and attachment of the statutory fee, such applications shall be forwarded to the appropriate address in accordance with §0.401(b) of the Rules.

47 C.F.R. § 90.127(a)

All applications for private land mobile licenses that require both frequency coordination and fees as set forth at Part 1, Subpart G of this chapter shall first be sent to a certified coordinator for the radio pool concerned as specified in §§90.20(c)(2) and 90.35(b)(2). After the appropriate coordination and attachment of the statutory fee, such applications shall be forwarded to the appropriate address in accordance with §0.401(b) of the Rules. A list of the certified frequency coordinators may be obtained from the Federal Communications Commission, Gettysburg, Pennsylvania 17326.

47 C.F.R. § 90.131(a)

Any application except for mutually exclusive applications or against which a petition to deny has been filed may be amended as a matter of right at any time prior to the time the application is granted or designated for hearing. Each amendment to an application shall be signed and submitted in the same manner as required for the original application. The procedures for amendment applications mutually exclusive under this part, applications against which a petition to deny has been filed, and applications designated for hearing are set forth in §1.918.

47 C.F.R. § 90.164(a)

Applications and amendments to applications are classified as major or minor when such filings concern facilities used to provide commercial mobile radio services. Categories of major and minor filings are listed in Section 309 of the Communications Act of 1934, as amended (47 USC 309). In general, a major filing is a request for a Commission action that has the potential to affect parties other than the applicant. The following are major filings: (a) Initial station authorization. Filings for an initial authorization as defined §90.165(d)(2) are major.

47 C.F.R. § 90.165(d)(1)

The "filing date" of an application is the date on which that application is received in a condition acceptable for filing or the date on which the most recently filed major amendment to that application was received, whichever is later, excluding major amendments in the following circumstances: (i) The major amendment reflects only a change in ownership or control found by the Commission to be in the public interest; (ii) The major amendment as received is defective or otherwise found unacceptable for filing; or (iii) The application being amended has been designated for hearing and the Commission or presiding officer accepts the major amendment.

47 C.F.R. § 90.175(f) [formerly 47 C.F.R. § 90.175(c)]

(f) For frequencies in the 929-930 MHZ band. A statement from the coordinator recommending the most appropriate frequency. For application under §90.495, the coordinator's statement must verify that the proposed system meets the requirements of that section.